Due service of the within Brief of Plaintiffs in Error is hereby admitted this _____ day of January, A. D. 1898.

_____

Attorneys for Defendant in Error.

6493. 273. 36.

Brief of Records for D.C. (Amo

Filed April 17, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 573.

SUPREME COURT, U. S.
FILED.
APR 17 1897
JAMES H. McKENNEY,
CLERK.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

Plaintiff in Error,

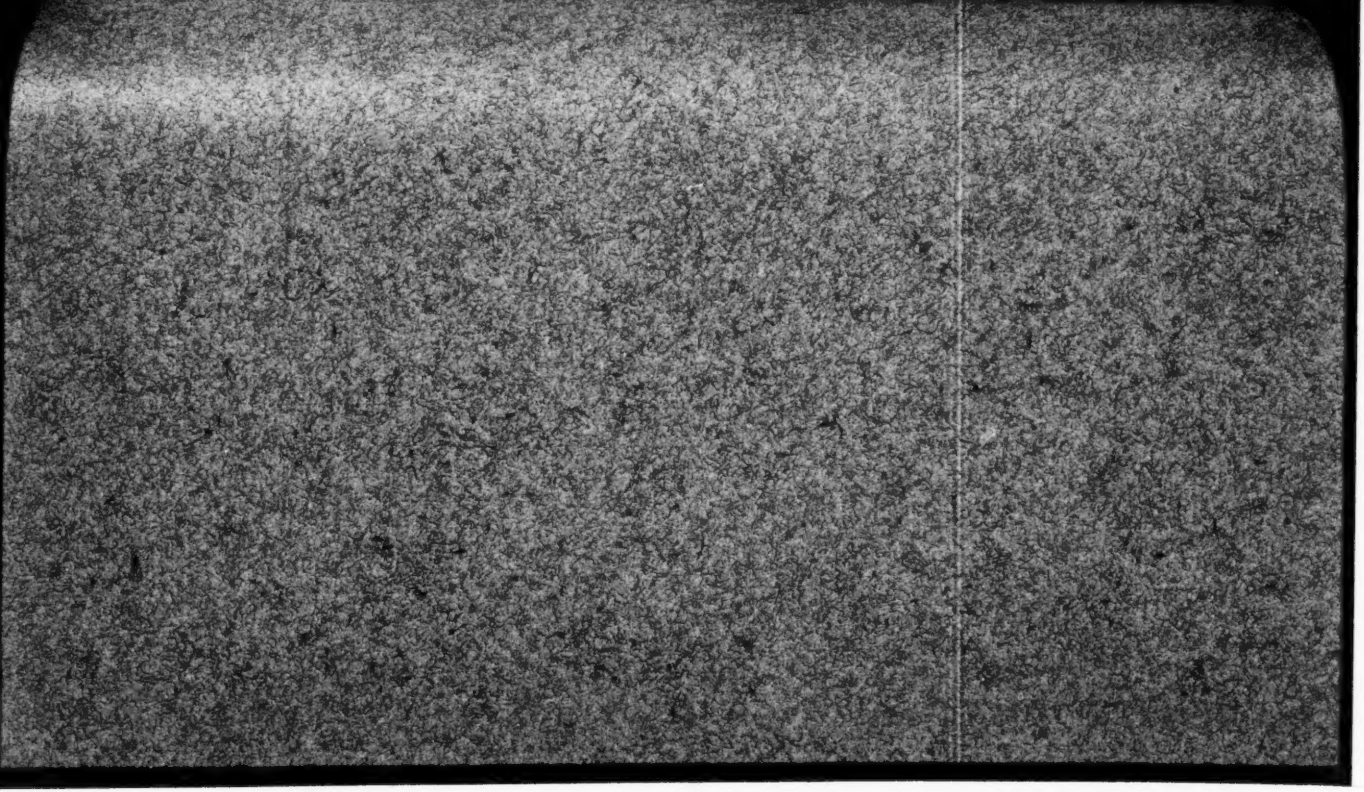
v.

RICHARD P. THOMAS and JOHN CHETWOOD, Jr.,

Defendants in Error.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR, BRIEF IN SUPPORT THEREOF, AND NOTICE OF SUBMISSION OF MOTION.

FILED APRIL , 1897.



In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

v.

RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Motion to Dismiss Writ of Error.

Comes now Richard P. Thomas, defendant in error, by his counsel appearing in that behalf, and moves this Honorable Court to dismiss the writ of error issued herein on the ground that this Honorable Court has no jurisdiction to review the judgment of the Supreme Court of the State of California, herein sought to be reviewed, in that:

1—No federal question was raised in the State court in the action in which said judgment was rendered.

2—There is no federal question iu said action.

3—Even if there is a federal question involved in said action, the decision of the appellate court was placed upon an independent ground not involving a federal question.

A. H. RICKETTS,

Counsel for Richard P. Thomas, Defendant in Error.

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,

v.

RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Notice of Submission of Motion to Dismiss.

To Messrs. Eddy Knapp and A. W. Thompson, Counsel for Plaintiff in Error, and to John Chetwood, Jr., Defendant in Error:

Please take notice that on Monday, the 17th day of May, A. D. 1897, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

A. H. RICKETTS,

Counsel for Richard P. Thomas, Defendant in Error.

In the Supreme Court of the United States. October Term, 1896. No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, Plaintiff in Error,
v.
RICHARD P. THOMAS and JOHN CHETWOOD, JR., Defendants in Error.

Brief in Support of Motion of Richard P. Thomas, Defendant in Error, to Dismiss the Writ of Error issued herein to the Supreme Court of the State of California.

Richard P. Thomas, defendant in error, has moved to dismiss the writ of error issued herein, on the ground that this Hon. Court has no jurisdiction to review the judgment herein sought to be reviewed, in that:

1—No federal question was raised in the State court.

2—There is no federal question in the case.

3—Even if there is a federal question involved in the case, the decision of the appellate court was placed upon an independent ground not involving a federal question.

STATEMENT OF FACTS.

The history of the case as disclosed by the record is as follows: On December 15, 1888, the California National Bank of San Francisco, incorporated under the National Banking Act, being unable to meet its obligations, suspended business and closed its doors. On January 14, 1889, the Comptroller of the Currency of the United States, having completed a preliminary investigation of the condition of the bank, through the Bank Examiners, declared the corporation insolvent under the Act of Congress entitled, "An Act authorizing the appointment of Receivers of national banks and for other purposes," approved June 30, 1876, and appointed a Receiver to take charge of its affairs. Such receiver at once qualified and entered upon the duties of his office, and was in office at the time of the commencement of the action next hereinafter referred to. On the 19th day of July, 1890, John Chetwood, Jr., defendant in error, holding twenty shares of the capital stock of the corporation and no more, commenced a suit in the Superior Court of the City and County of San Francisco, State of California, as a stockholder, for the benefit of the corporation, against Richard P. Thomas, defendant in error, R. R. Thompson and Robert A. Wilson as the executive committee of the Board of Directors of the bank, to recover $400,000 as damages for negligence,

being the amount claimed by Chetwood to have been lost to the bank by reason of bad loans made by the Cashier, and which losses, it was alleged in the bill, would not have occurred if the said three Directors had properly supervised the acts of the Cashier,—a supervision alleged to have been imposed upon them as members of said Executive Committee by the By-laws of the corporation,—and made the bank and the Receiver parties defendant. This suit was entitled, "John Chetwood, Jr., Plaintiff, vs. The California National Bank of San Francisco, et al., Defendants." On the 10th day of January, 1893, the plaintiff filed his amended complaint. Demurrers were interposed by the several defendants and were overruled, and the case went to issue on the 9th day of June following upon the answer of the defendants, Thompson and Wilson, and a stipulation that their answer should stand as the answer of the defendants Thomas and the corporation. The Receiver did not answer. On April 27, 1894, the trial having taken place, the Court made its minute order directing a judgment to be entered in favor of the plaintiff, for the benefit of the corporation, and against the defendants Thomas, Thompson and Wilson, for an amount equal to the actual loss to the bank, resulting from the bad investments made by the Cashier, and, for the purpose of determining the amount for which the judgment should be entered, directed the appointment of a referee. Subsequently such referee was duly appointed and qualified, and, on the 17th day of August, 1894, he reported the aggregate amount of the actual loss to the bank, resulting from the bad investments made by the Cashier. On September 24th, 1894, Chetwood and the defendants Thompson and Wilson appeared in court and presented a stipulation dated September 13th, 1894, to the effect that the action should be dismissed as to Thompson and Wilson, whereupon a judgment was entered dismissing the action as to them. The consideration for such dismissal, as recited in the findings, was the payment by them of the sum of $27,500, which sum was received by the plaintiff and credited upon the amount found to be due to the bank from the three defendants, Thomas, Thompson and Wilson. Thomas was not a party to this arrangement, nor does it appear that he was ever notified of the plaintiff's intention of dismissing the action as to Thompson and Wilson. After this settlement was made with Thompson and Wilson, and on the 20th day of November following, findings were filed in which it was expressly found that the amount of the actual loss to the corporation was the sum of $166,919; that $27,500 had been paid on account of such loss by Thompson and Wilson, and that the net loss to the bank was $139,419, for which amount the Court ordered a judgment to be entered against Thomas, defendant in error. From that judgment an appeal was taken by Thomas to the Supreme Court of the State

of California. The decision was rendered by that court on July 22, 1896 (113 Cal., 414). The Supreme Court of the State of California reversed the judgment so rendered against Thomas, and directed a judgment to be entered in his favor against the plaintiff Chetwood, and in so deciding held that the suit sounded in tort and was simply an action to recover damages for negligence. The judgment was reversed on three grounds: *First*, that the court failed to find upon the most material issues of the case; *second*, that the case made out by the findings is a different case from that presented by the pleadings; and *third*, that the acceptance by the plaintiff in the action of $27,500 from Thompson and Wilson was a *retraxit* and an extinguishment of the cause of action as against Thomas.

POINTS.

I.

No federal question was raised in the State court.

This writ of error has been sued out in the name of the bank, as plaintiff in error, by John Chetwood, Jr., defendant in error and the original plaintiff in the State Court. He voluntarily brought the suit in the State Court, and there is no doubt that the State court at all times had jurisdiction of the case. (Ex parte—in the matter of John Chetwood, Jr., Petitioner, 17 Supreme Court Reporter, 385—opinion delivered February 15, 1897). The amended bill, upon which the case went to trial, shows that the plaintiff sued as a stockholder for the benefit of the bank, and alleges a demand upon the Board of Directors of the corporation, the Receiver and the Comptroller to bring the action, and their refusal. It then sets forth the organization of the defendant corporation as a national bank on October 20, 1886, with a capital stock of $200,000, divided into 2,000 shares of the par value of $1,000 each, and then alleges that the entire capital stock was subscribed for by various persons, and fully paid, and that the plaintiff therein owned 20 shares from its organization; that the articles of association provided for a Board of Directors to consist of seven shareholders, and that such Board was duly elected at the first meeting of shareholders at the time of the organization of the corporation, and thereupon entered upon the discharge of its duties; that the articles of association provided that such Board of Directors should elect from their number a President and Vice-President, should define the duties of the officers and clerks of the corporation, should make all By-laws which it might be convenient and proper to

make for the general regulation of the business of the corporation and the management and administration of its affairs, and generally to do and perform all the acts required of a Board of Directors. It then alleges the election of Thomas, Thompson and Wilson as three members of said Board of Directors at the first election for Directors, and their subsequent re-election at all subsequent annual meetings; and the holding of a meeting of the Board of Directors after the election of these three gentlemen, at which a code of By-laws was adopted which has never been changed. It then sets forth what purports to be section 7 of the code of By-laws, which provides for the appointment by such Board of Directors of a committee to be known as "The Executive Committee," to consist of the President and Vice-President and one or more Directors, "who shall have and exercise immediate supervision of all the affairs and business of the Bank; who shall audit all bills for current and other expenses; who shall have power to discount and purchase bills, notes and other evidences of debt, as well as power to buy and sell bills of exchange, coin and bullion, and loan money on personal security, and who shall report to the Board of Directors at each regular meeting." It also sets forth sections 17 and 18 of its code of By-laws, which regulate respectively the duties of the President and Vice-President, and then proceeds to allege the election of Thomas as President and Wilson as Vice-President of the corporation, and the appointment of Thompson to act with Thomas and Wilson as "The Executive Committee" of the bank, and then avers that Thomas, Thompson and Wilson constituted "The Executive Committee" from the organization of the bank until its suspension. It then alleges that as such Executive Committee certain duties were imposed upon the three members, who, not regarding their duties, "but wholly disregarding the same, and contriving together to injure and deceive the said corporation, neglected and omitted, without any reasonable excuse, to exercise their own skill, care, judgment and discretion in the making of loans and discounts out of the moneys in the possession of said bank, and otherwise directing the business of said bank, but they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit, and without consulting or in anywise informing the said defendants, or any or either of them, to lend the moneys of the bank according to his own pleasure, to buy bills of exchange without any consultation with said defendants," and then proceeds to aver that the said Cashier did loan out the moneys of the bank to "irresponsible persons with no adequate security, bought unauthorized, unsecured and valueless bills of exchange," and that by said negligence the moneys of the bank were wasted to the sum of

about $200,000. Then there are certain specific instances alleged where moneys were loaned by the Cashier and not returned, aggregating $85,500. Then comes an allegation that "by divers other like careless, unbusinesslike and improvident loans and transactions the said Cashier misused and lost divers other sums of money belonging to the bank, amounting in the aggregate to about $50,000 more." Then follows an allegation that by reason of all said loans, and *the failure of the borrowers to return the money*, the capital surplus of the bank became reduced from $230,000 to about $170,000, and that said sum of $170,000 suffered a still further diminution of more than $120,000 by certain transactions had with one Woodard and one Gutman, and that said reduction rendered it necessary for the bank to suspend payment and a Receiver to be appointed, and rendered necessary the levying by the Comptroller of the Currency of an assessment of $75,000 upon the stockholders, and that the members of the Executive Committee could have prevented the occurrence by giving attention to and discharging the duties of their said trust, and that had they done so none of said losses and improvident uses of money would have occurred, but that they neglected their duties and permitted the Cashier to do as he pleased with the moneys. Then follows an allegation that the corporation was doing a good business, and its profits ought to and would have been very large, as it had accumulated $30,000 in two years, but that this surplus was all lost by the improvident loans of the Cashier and the aforesaid negligence of the members of the Executive Committee in permitting him to make the loans. It is then averred that the bank suspended on December 15, 1888, owing about $450,000; that the Comptroller of the Currency of the United States took charge of the bank and placed a Receiver in charge, and that in order to pay the debts the Receiver had to sacrifice the assets of the bank to an extent of between twenty and thirty per cent, and that thereby the corporation lost between twenty and thirty per cent of its assets, and concludes with a prayer for a decree directing the defendants in said action, Thomas, Thompson and Wilson, to restore unto the corporation the $400,000 lost by their negligence, and that a money judgment against them, with legal interest thereon from the time of such loss, be rendered in favor of said corporation.

To this amended complaint special demurrers were interposed by the defendants and overruled. An answer was then interposed by two of the defendants in the action, Thompson and Wilson, which, by stipulation, was to stand as the answer of the defendants Thomas and the Bank. The answer denies that the members of the Executive Committee, or any of them, ever assumed or had any other supervision of the officers and busi-

ness of the corporation other than that imposed by section 7 of the By-laws, or that they ever had any duties to perform other than as set out in said section 7 of the By-laws. It then sets up section 19 of the By-laws, which defines the duties and powers of the Cashier, and section 24 of the By-laws, which provides for the appointment and duties of another sub-committee of the Board of Directors, to be known as the Auditing Committee. It then alleges the appointment of this committee upon the organization of the bank, and its existence during the period the bank remained in business. The answer denies specifically all the allegations of negligence set out in the amended bill, and sets up generally that the members of the Executive Committee acted with ordinary care and prudence in the management of the affairs of the bank.

We submit that no federal question has been set up by these pleadings. The sole proposition presented by the pleadings was: That because the Cashier of a National Bank, a trusted and honest official appointed by its Board of Directors, holding his office at the pleasure of the Board, made in good faith, but without the knowledge or advice of the Board or any of its members, loans which were unpaid at maturity, a sub-committee of three members of the Board, known as "The Executive Committee," are liable to the corporation in a civil suit for the amount of the loans and interest, under a By-law enacted prior to the making of the loans, giving this sub-committee the immediate supervision of the employees of the bank, and that such liability attached irrespective of the fact that no legal means had been resorted to to collect these notes.

The case went to the Supreme Court of California on an appeal from the judgment. There was no motion for a new trial, and upon such an appeal the inquiries of the appellate court were limited to two propositions:

First—Is the case made out by the findings the case presented by the pleadings?

Second—Do the findings support the judgment?

When the case reached the appellate court the appellant contended that the case made out by the findings was one for damages against him separately, resulting from his failure to perform the duties of his office as President of the bank, whereas the case made out by the pleadings was one against him and his co-defendants, Thompson and Wilson, jointly, for damages resulting from their failure to perform the duties of their office as Directors, and further that the findings did not support the judgment for the reason that the former showed that two of the joint tort-feasors had paid $27,500, and in consideration of such payment were released; and that such release operated as a release to the appellant and extinguished the debt.

No suggestion of any federal question was made to the trial or to the appellate court. No such question was ever raised until the presentation of the petition for the writ of error, and such petition forms no part of the record upon which action here is taken, Manning v. French, 133 U. S., 186; Railway Co. v. Fitzgerald, 160 U. S., 556-575. No original papers could be filed in the appellate court on that appeal. No federal question having been raised in the trial court, this court, therefore, has no jurisdiction to review the judgment of the appellate court. As was said by Chief Justice Fuller in Chappell v. Bradshaw, 128 U. S., 132: "To give this court jurisdiction to review the judgment of a State court under section 709 of the revised statutes, because of the denial by a State court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time, in the proper way. 'To be reviewable here,' says Waite, C. J., in Spies v. Illinois, 123 U. S., 181, 'the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more.' Tested by this well-settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him."

In the still later case of Fowler v. Lamson, decided November 30, 1896, 17 Supreme Court Rep., 112, this Court again says: "Thus, there is an entire absence in this whole record of any fact showing that the Supreme Court of Illinois, or either of the lower courts, decided any federal question whatever. The assignment of errors alleged to have been made by the Illinois Supreme Court is unavailable for the purpose of showing any federal question decided, where the record itself does not show that any such question was passed upon by the State court. Railway Co. v. Fitzgerald, 160 U. S., 556–575.

"Where a case is brought to this court on error or appeal from a judgment of a State court, unless it appear in the record that a federal question was raised in the State court before the entry of final judgment in the case, this court is without jurisdiction. Simmerman v. Nebraska, 116 U. S., 54.

"It has also been frequently decided that, to give this court jurisdiction on writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was decided

adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Eustis v. Bolles, 150 U. S., 361; Powder Works v. Davis, 151 U. S., 389–393; Railway Co. v. Fitzgerald, 160 U. S., 556–576.

"Nothing of the kind appears from this record, and the writ of error must therefore be dismissed."

II.

There is no federal question in the case.

The claim is made here on behalf of the plaintiff in error that, because the Supreme Court of the State of California, in reversing the judgment sought to be reviewed here, held that the acceptance by Chetwood, as plaintiff in the original action, of $27,500 from two of the defendants, operated as an extinguishment of the debt of the bank against all three defendants, the bank has by that decision been deprived of its property, namely, its judgment against Thomas, without due process of law. As the bank was a party to the action, and had been duly served, it is difficult to see how this view could prevail. But the position taken by the appellate court is that the action sounded in tort, and their application of the well settled rule that the release of one joint tort-feasor is the release of all the others certainly can not involve a federal question, even if the tort-feasors were directors of a national bank.

III.

Even if there is a federal question involved in the case, the decision of the appellate court was placed upon an independent ground not involving a federal question.

One of the grounds upon which the appellate court placed its decision was that the trial court had failed to find upon the most material issues of the case. This necessitated a reversal of the judgment.

Laughlin v. *Wright*, 63 Cal., 113.
S. P. Co. v. *Crampton*, 63 Cal., 537.

Surely, by the most refined reasoning, no federal question can be involved in reaching that conclusion. Another ground upon which the State Court placed its decision was that the case made out by the findings is a different case from that presented by the pleadings, and, in this regard, it held that while the pleadings

presented a case against the three Directors for damages for neglecting to perform their duties as Directors, yet the findings showed a case against Thomas, the President, for failing to perform the duties of his office as President. This also necessitated a reversal.

Bryan v. *Tormey*, 84 Cal., 126.
Putnam v. *Lamphier*, 36 Cal., 151.

And no federal question could be involved in reaching this conclusion.

The third ground was as above stated, that the acceptance by the plaintiff from two of the joint tort-feasors of an amount less than the whole judgment released the third tort-feasor, and was an extinguishment of the debt, and we have already presented our views in support of the proposition that no federal question was involved in reaching this conclusion.

It is respectfully submitted that the writ of error be dismissed.

A. H. RICKETTS,
Counsel for Richard P. Thomas, Defendant in Error.